No. 82-2135

FILED
JUN 29 1983
ALEXANDER L. STEVAS,
CLERK

IN THE

Supreme Court of the United States

ROBERT JOHN WAGNER,

Petitioner,

vs.

PEOPLE OF THE STATE OF COLORADO,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE
COLORADO COURT OF APPEALS

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Questions Presented for Review

A. Whether a warrantless stop of a motor vehicle can be valid where the stopping officer has neither probable cause nor articulable facts giving rise to a reasonable suspicion that a crime is being committed.

Opinion Below

The opinion of the Colorado Court of Appeals is set forth in the Appendix, as is its order of January 27, 1983, denying petitioner's petition for rehearing. The Colorado Supreme Court denied certiorari on May 5, 1983. Its order is included within the Appendix.

Grounds on Which the Jurisdiction of this Court is Invoked

28 U.S.C. § 1254(1): certiorari jurisdiction.

Constitutional Provisions and Statutes

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the person or things to be seized. *United States Constitution Amendment IV.*

Statement of the Case

Petitioner, Robert John Wagner, was convicted of menacing under §18-3-206, Colo.Rev.Stat. 1973, arising out of an incident involving Trooper Bradley of the Colorado State Patrol and the petitioner. The incident was precipitated by a stop of three vehicles owned by the petitioner on June 21, 1980. The stop was conducted by Trooper Bradley as the vehicles were preparing to enter an interstate highway from a county road, at a time the vehicles were proceeding in an entirely lawful manner.

All three vehicles were stopped and impounded. The claimed justification for the stop was the Trooper's assertion that the trucks might be overweight based on the following claimed observations: that he had seen the vehicle in the lead on prior occasions loaded with rocks, that the vehicles were all loaded with rocks, that he believed he had seen the petitioner in person previously arguing about the weighing of his trucks at a port of entry, and that the county road in question was used by truckers to avoid a port of entry where weighing facilities existed.

The Colorado Court of Appeals upheld the stop on the grounds that Trooper Bradley "had sufficient personal information to justify his decision to question defendant respecting the load he was carrying and whether he had submitted to a port of entry weigh-in." The Court of Appeals did not state, however, what facts were relied upon in reaching this decision.

On the contrary, the record demonstrates that the trucks were stopped without objective basis for suspicion, simply because the Trooper wanted to ascertain whether the trucks could be found to be in violation of weight bearing or other laws. The Trooper focused his attention on the tractor-trailer in the lead, which he claimed to be able to identify from a prior incident and from seeing it while he was in his "private vehicle" at a time when the truck was lawfully engaged in the hauling of rocks for landscaping.

On the date of the illegal stop, Trooper Bradley did not claim to have witnessed any violations of the law, nor to have grounds to believe it to be overweight. Rather, he merely felt "that it was necessary to weigh it", while at the same time conceding that he did not have "alot of experience in weighing trucks with rocks on them", and thus, he did not know "how much the rocks weighed". Clearly, the purpose of the stop was to investigate to try to find a violation, without regard for the absence of any reasonable grounds to suspect wrongdoing.

The tractor-trailer he claimed prior knowledge of was not, in fact, overweight, clearly showing the pretext character of the stop and impound. More importantly, however, permitting such intrusions would be to sanction the stopping of any vehicle despite the absence of observable indicia of wrongdoing, simply because an officer might feel it was "necessary" to inspect it, test it, or search it to look for violations.

Argument

It is well-established that even an investigatory stop must be premised on articulable facts which give rise to a reasonable

conclusion that a violation of the law has occurred. As was stated almost sixty years ago in *Carroll* v. *United States*, 267 U.S. 132, 45 S.Ct. 280, 69 L.Ed. 543 (1925):

> Having thus established that contraband goods concealed and illegally transported in an automobile or other vehicle may be searched for without a warrant, we come now to consider what circumstances such search may be made. It would be intolerable and unreasonable if a prohibition agent were authorized to stop every automobile on the chance of finding liquor and thus subject all persons lawfully using the highways to the inconvenience and indignity of such a search. Travelers may be so stopped in crossing an international boundary because of national self-protection reasonably requiring one entering the country to identify himself as entitled to come in, and his belongings as effects which may be lawfully brought in. But those lawfully within the country, entitled to use the public highways, have a right to free passage without interruption or search unless there is known to be a competent official authorized to search, probable cause for believing that their vehicles are carrying contraband or illegal merchandise.

Although modern events have filled in the gaps in the *Carroll* formulation, this Court's more recent constitutional decisions still require the existence of articulable facts to justify any search or seizure, including the stop of motor vehicles. *See, e.g., Delaware* v. *Prouse*, 440 U.S. 648, 99 S.Ct. 1391, 59 L.Ed.2d 660 (1979); *United States* v. *Brignoni-Ponce*, 422 U.S. 873, 95 S.Ct. 2574, 45 L.Ed.2d 607 (1975). *See also United States* v. *Shaefer*, 691 F.2d 639 (3rd Cir. 1982); *United States* v. *Shaefer*, 637 F.2d 200 (3rd Cir. 1980). In the absence of such articulable objective facts, a stop or arrest is unlawful.

This case involves just the sort of roving spot checking that was condemned in *Delaware* v. *Prouse, supra*. As Justice White stated in that case:

> The Fifth and Fourteenth Amendments are implicated in this case because stopping an automobile and detaining its occupants constitutes a seizure within the meaning of those Amendments, even though the purpose of

> the stop is limited and the resulting detention quite brief. The essential purpose of the proscriptions in the Fourth Amendment is to impose a standard of "reasonableness" upon the exercise of discretion by government officials, including law enforcement agents, in order "to safeguard the privacy and security of individuals against arbitrary invasions. . . " Thus, the permissibility of a particular law enforcement practice is judged by balancing its intrusion on the individual's Fourth Amendment interests against its promotion of legitimate governmental interests. Implemented in this manner, the reasonableness standard usually requires, at a minimum, that the facts upon which an intrusion is based be capable of measurement against "an objective standard," whether this be probable cause or a less stringent test. In those situations in which the balance of interests precludes insistence upon "some quantum of individualized suspicion," other safeguards are generally relied upon to assure that the individual's reasonable expectation of privacy is not "subject to the discretion of the official in the field." *Delaware* v. *Prouse, supra. See also United States* v. *Mandenhall,* 446 U.S. 544, 100 S.Ct. 1870, 64 L.Ed.2d 497 (1980).

In this case, the procedure engaged in by the Colorado State Patrol surely falls into the description of actions taken at "the discretion of the official in the field". *Delaware* v. *Prouse, supra.* Petitioner's tractor-trailers were stopped, not because the officer had evidence that they had avoided a port of entry, or that they were overweight, but merely because the officer thought they might be overweight, and he wanted to find out if they were overweight. It is difficult for any reasonable person to imagine any tractor-trailer rig which did not "look heavy", especially when they were loaded with rocks. Here, the officer's suspicion was based solely upon a general characteristic common to all large trucks loaded with heavy materials. There was no specific articulable fact, such as flattened tires, or the inability to travel at a reasonable speed, which would lead to a reasonable suspicion of criminal activity based on objective indicia.

In this regard, such a stop is much like the drug courier cases in which the lower Federal Courts have held that investigating stops at airports cannot be based on so-called "profiles" involving such factors as the originating city, the dress of the passenger, or "nervous actions". *See, e.g., United States* v. *Harrison*, 667 F.2d 1158 (4th Cir. 1982); *United States* v. *Corbin*, 662 F.2d 1066 (4th Cir. 1981). *See also People* v. *Kiser*, N.E.2d (Ill.Ct.App., announced March 21, 1983). Utilization of factors which do not distinguish the victim of the stop from other travelers simply cannot serve as justification for random spot checks, just as the race of the driver was an insufficient basis for a random "border" check in *United States* v. *Brignoni-Ponce, supra*. This Court has uniformly held that:

> The balance between public interest and the defendant's right to personal security and privacy tilts in favor of freedom from police interference. *Brown* v. *Texas*, 443 U.S. 47, 99 S.Ct. 2637, 61 L.Ed.2d 357 (1979).

Petitioner prays that this Honorable Court will grant its writ of certiorari to review the opinion of the Colorado Court of Appeals in this case, in which a citizen's right to personal security and privacy was completely extinguished in favor of a claimed public interest in random weight checks. If this decision by the Colorado Court of Appeals is left standing, this will clearly open the way for pretext searches, or even worse, for arrests based on alleged past conduct or political dissent. This might include routine stops for searches of persons previously stopped, arrested, or convicted for crimes, detention of past political protestors for

searches, or even the casual seizure of personal records from persons ever suspected of fiscal misdeed or tax evasion. This would be unconscionable in a free society.

Respectfully submitted,

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No. 83SC57

IN THE

Supreme Court of The State of Colorado

JANUARY TERM, 1983

ROBERT JOHN WAGNER,
Petitioner,

vs.

THE PEOPLE OF THE STATE OF COLORADO,
Respondent.

CERTIORARI TO THE COLORADO COURT OF APPEALS
Case No. 81CA0790

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS.

After review of the record, the briefs and the opinion of the Court of Appeals,

IT IS ORDERED by this court that said petition be, and the same hereby is, denied.

May 5, 1983

By the Supreme Court
Sitting En Banc

cc Scott H. Robinson
GERASH & ROBINSON, P.C.
1439 Court Place
Denver, CO 80202

Marie V. Bahr
Assistant Attorney General

Mac V. Danford, Clerk
Colorado Court of Appeals

Supreme Court
State of Colorado
Certified to be a full, true and correct copy

DAVID W. BREZINA
Court Seal — Clerk of the Supreme Court
By _____
Deputy Clerk

IN THE

Court of Appeals of The State of Colorado

Case Number 81CA0790

THE PEOPLE OF THE
STATE OF COLORADO,
Plaintiff-Appellee,

vs. ORDER

ROBERT JOHN WAGNER,
Defendant-Appellant.

Upon consideration of the Petition for Rehearing filed by the appellant herein, said Petition is hereby denied. Unless otherwise ordered, mandate will issue 2/3/83.

BY THE COURT,

DATED: 1/27/83

If certiorari to the Supreme Court is planned and a stay of issuance of mandate desired, petition for such stay must be filed in the Court of Appeals prior to the above date of issue.

Appendix A

No. 81CA0790

THE PEOPLE OF THE STATE OF COLORADO,

Plaintiff-Appellee,

v.

ROBERT JOHN WAGNER,

Defendant-Appellant.

Appeal from the District Court of Morgan County
Honorable Carl Absmeier, Judge

DIVISION III
Opinion by JUDGE KIRSHBAUM JUDGMENT AFFIRMED
Van Cise and Tursi, JJ., concur

J. D. MACFARLANE, ATTORNEY GENERAL
Richard F. Hennessey, Deputy Attorney General
Mary J. Mullarkey, Special Assistant Attorney General
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Attorney for Defendant-Appellant

Defendant, Robert John Wagner, appeals his conviction of menacing by the use of a deadly weapon, §18-3-206, C.R.S. 1973 (1978 Repl. Vol. 8). We affirm.

The record reveals the following facts pertinent to the issues raised on appeal. In April 1980, Officer Bradley of the Colorado Highway Patrol observed defendant vociferously protesting the weighing of his truck at a port-of-entry weigh station. On June 21, 1980, Officer Bradley observed the same truck entering a state highway from a county road known as Long Bridge Road. The Long Bridge Road was known to the officer to be a route often taken by truckers to avoid port-of-entry stations. It appeared to the officer that the truck was overloaded with rocks, and he proceeded to stop and impound it.

Two days later, defendant, without obtaining appropriate clearance, drove the truck away from the port-of-entry station to which it had been taken. Highway Patrol Officer Goldsmith observed defendant's actions and, upon discovering that the truck had not been released, attempted to intercept defendant by placing his official car across the highway. As defendant's truck approached, Officer Goldsmith sought to flag it down. Defendant then directed the truck toward Officer Goldsmith, forcing the officer to jump aside. Officer Goldsmith then fired shots at the truck's tires, ultimately causing it to stop. Defendant was arrested.

During trial, defendant filed a motion *in limine* for production of a tape recording, created by defendant, containing various conversations held June 23, 1980, among defendant, his brother Steve, and others. Prior to trial, during a meeting attended by defendant, a portion of the tape recording was erased when Officer Goldsmith attempted to play the tape. Although defendant's attorney argued during the hearing that he wished to use portions of the tape as "corroborating evidence," he also stated that he was "well aware they are not admissible." After reviewing the tape, the trial court concluded that it was unintelligible, that there was no identification of voices, that it was self-serving, and that it constituted hearsay. The trial court then denied defendant's request to introduce portions of the remaining tape into evidence.

Defendant first contends that Officer Bradley did not have sufficient grounds to stop the truck defendant was driving on June 21, 1980. We disagree.

The trial court found that Officer Bradley had sufficient personal information to justify his decision to question defendant respecting the load he was carrying and whether he had submitted to a port-of-entry weigh-in. The record supports the trial court's conclusion that the officer was aware of articulable facts supporting a reasonable suspicion that the vehicle or its occupants had committed a violation of the law. *People v. McPherson*, 191 Colo. 81, 550 P.2d 311 (1976). Hence, that decision will not be disturbed on appeal.

Defendant also contends that the trial court erred in ruling that no portion of the remaining tape recording was admissible. We disagree.

As a sanction to prevent improper police conduct, dismissal of criminal proceedings is sometimes warranted when exculpatory evidence in police custody is lost or destroyed. *People v. Morgan*, 199 Colo. 237, 606 P.2d 1296 (1980). This sanction also serves to ensure that a defendant is not so prejudiced by loss of evidence that the truth-finding process is irreparably harmed. *People v. Robias*, 193 Colo. 496, 568 P.2d 57 (1977). A defendant seeking the imposition of this sanction has the burden of establishing the prejudicial effect of the unavailable evidence. *People v. Morgan, supra.*

Here, defendant did not move for dismissal of the case. Furthermore, he failed to establish what portions of the remaining tape were not merely corroborative of other testimony, and conceded at one point that the portions he contemplated offering into evidence were inadmissible. Defendant failed to demonstrate any prejudice because of the partial destruction of the tape; hence, the trial court was under no obligation, *sua sponte*, to dismiss the action. We further conclude that the trial court did not abuse its discretion in denying defendant's request to introduce into evidence unspecified portions of the extant tape recording.

Nor is there merit to defendant's contention that certain instructions and the jury verdict forms were improper in form because they first discussed the jury's options upon a finding of

guilt rather than initially discussing the jury's options upon a finding of not guilty. No evidence or authority was presented to support defendant's assumption that the order of discussion of issues within the instructions and the jury forms materially affected the jury's deliberations.

Defendant's final contentions, that certain evidence was improperly admitted and that the instructions improperly failed to include lesser offenses, are also without merit. Defendant did not object to the challenged evidence at the time it was offered; therefore, absent plain error, that allegedly erroneous ruling cannot serve as a basis for reversal. *People v. Vigil*, 180 Colo. 104, 502 P.2d 418 (1972); Crim. P. 52. Similarly, absent plain error, defendant's failure to request any instructions on lesser-included offenses other than those given by the trial court precludes reversal based on that asserted error. There was no plain error here.

The judgment is affirmed.

JUDGE VAN CISE and JUDGE TURSI concur.

Appendix B

No. 81CA0790

IN THE COURT OF APPEALS STATE OF COLORADO

ORDER

THE PEOPLE OF THE STATE OF COLORADO,

Plaintiff-Appellee,

v

ROBERT JOHN WAGNER,

Defendant-Appellant.

Upon consideration of the Motion for Stay of Mandate filed in this case, it is ordered that issuance of the Mandate hereby be, and the same hereby is, stayed to and including February 28, 1983, provided that if Petition for Writ of Certiorari is timely filed with the Supreme Court of the State of Colorado, the stay shall remain in effect until disposition of the within cause by the Supreme Court.

FOR THE COURT OF APPEALS:

DATED: 1/31/83